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No. 05-1612

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Respondent submits this Brief in Opposition to the Petition for a Writ of Certiorari.

Because Petitioner cannot establish a prima facie case of sexual harassment under any standard of liability, including the standard that she urges the Court to consider, the judgment of the Sixth Circuit Court of Appeals is correct, and the petition should be denied.

STATEMENT OF THE CASE

Petitioner Latanua Rudd, a female, was harassed on the job by a male co-worker, Lance Burton, when he wrestled with her and handcuffed her to a filing cabinet. At the time of the incident, both Rudd and Burton were commissioned deputy sheriffs employed by Respondent Shelby County Sheriff's Department. Rudd testified that Burton did not try to fondle her breasts, buttocks or private parts, but she felt his penis on her hip while they were wrestling. (Trial Transcript (hereinafter "TR") 137) Several co-workers heard the commotion, but none witnessed Burton rubbing himself on Rudd. Later that night when Rudd related the incident to her supervisors, she did not tell them that she could feel Burton's penis while they were wrestling. (TR 140 & 79-80) She did not tell them that Burton had sexually harassed her. (TR 141 & 217) She asked her supervisor Lt. Moore to tell Burton to leave her alone, and Lt. Moore did exactly what she asked him to do. He told Burton to leave her alone. Rudd conceded in her Complaint (¶ 33) that "Sgt. Nelson and Lt. Moore finally instructed Sgt. Burton not to bother Ms. Rudd." Although Burton taunted Rudd with gender-neutral verbal

jabs before and after the wrestling/handcuffing incident, ("Is it too hot in the kitchen, baby?" – Page 7 of Petition) he did not touch her again after Lt. Moore told him to leave her alone.

Rudd knew that Shelby County had a written sexual harassment policy with a complaint procedure. On four previous occasions, Burton had offended her by touching her inappropriately. She considered each separate incident an act of sexual harassment, but she never reported him for sexually harassing her. (TR 160-64)

On the night of the handcuffing incident, Rudd did not tell anyone that she wanted to file a complaint against Burton for any reason. (TR 141) The next day, she telephoned the Sheriff's Department to report his inappropriate behavior. She spoke with Lt. Floyd Bonner in the Internal Affairs Bureau ("IAB"). Bonner asked Rudd to submit a written report. (¶¶ 12-17 of Trial Exhibit 50 – Stipulated Facts (hereinafter "SF")) As the result of her phone conversation with Bonner, she and Burton were separated, and the IAB immediately initiated an investigation. (TR 324 & SF ¶¶ 20 & 21) Rudd had no interactions with Burton after the night he handcuffed her to the filing cabinet. (SF ¶ 11)

After the IAB investigation was completed, Burton was suspended without pay for 30 days and demoted. (SF ¶¶ 34 & 35) The suspension and demotion cost him $4,978.56. (SF ¶ 37)[1] Rudd's two supervisors were also

[1] Burton appealed the discipline to the Shelby County Civil Service Board. Before the appeal was heard, he settled the matter by retiring at the rank of sergeant. In the settlement, he did not recoup any lost wages. His retirement pension is based on his highest 36 months of employment and not his rank. (TR 676-77) His pension benefits will

(Continued on following page)

disciplined as the result of the IAB investigation. (SF ¶ 38-40)

REASONS FOR DENYING THE WRIT

I. Petitioner cannot establish a prima facie case of sexual harassment under either the negligence or deliberate indifference standard.

The Court has explained that "[a]n employer is negligent with respect to sexual harassment (and therefore liable under Title VII) if it knew or should have known about the conduct and failed to stop it." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759, 118 S.Ct. 2257, 2267 (1998).

The foregoing statement was presaged by *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872-873 (6th Cir. 1997), cert. denied, 522 U.S. 1110 (1998), where the Sixth Circuit held that to prevail on a claim of sexual harassment, a victim must show, among other things, that her employer "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."

In *Faragher v. Boca Raton*, 524 U.S. 775, 799, 118 S.Ct. 2275, 2289 (1998), the Court cited *Blankenship* to support its statement that the Courts of Appeals have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard."

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always be lower because of his demotion and the corresponding reduction in pay for his last few months of employment.

The first prong of this negligence standard, "*knew or should have known of the harassment*," is an objective standard which "equates *negligent* ignorance of the existence of harassment with *intentional* discrimination." *Blankenship*, 123 F.3d at 873. (Court's emphasis) Thus, "negligence as to the existence of harassment may be enough" for an employer to incur liability for sexual harassment by a co-worker. *Id.*

The second prong of the negligence standard imposes Title VII liability where the employer "*failed to implement prompt and appropriate corrective action*" once it knew or should have known of the sexual harassment.

Petitioner's argument focuses on *Blankenship's* interpretation of this second prong of the negligence standard where the Sixth Circuit explained that "mere negligence as to the content of the response cannot be enough to make the employer liable." 123 F.3d at 873. Instead, the employer will be liable only if its remedy to correct the hostile work environment "exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination." *Id.*

Judge Merritt filed a concurring opinion in *Blankenship* suggesting that the standard should be labeled as "deliberate indifference by the employer to the sexual harassment in its workplace." 123 F.3d at 875.

Judge Ryan also filed a concurring opinion agreeing that the district court's summary judgment should be affirmed because the victim's employer had responded reasonably to her allegations of sexual harassment. He disagreed, however, with the majority's adoption of the "good faith" standard for judging an employer's response to charges of sexual harassment. 123 F.3d at 876-77.

This "reasonable care" or "good faith" standard is not "idiosyncratic" as Petitioner suggests. (Petition page 2) It is similar to the Third Circuit's standard: "Even if not effective, an employer's remedial measure is nonetheless adequate if 'reasonably calculated' to end the harassment." *Jensen v. Potter*, 435 F.3d 444, 453 (3rd Cir. 2006) (opinion by Alito, J.). The Seventh Circuit also recognizes this standard. *See, Shaw v. AutoZone*, 180 F.3d 806, 812 (7th Cir. 1999) ("The law does not even require that the employer's actions prevent harassment, but merely that its response was reasonably likely to prevent future harassment").

In the case sub judice, Rudd's trial testimony and other evidence in the record establish that under either standard, indifference or negligence, Shelby County took appropriate corrective action once it knew or should have known of the alleged sexual harassment. *See, Courtney v. Landair Transport, Inc.*, 227 F.3d 559, 565 (6th Cir. 2000) ("We agree with the court below that, taking the evidence in the light most favorable to plaintiff, the defendant's conduct was not *negligent or indifferent* to plaintiff's situation."). (Emphasis added)

It was Rudd's responsibility to inform her supervisors that she perceived Burton's conduct as sexual harassment. However, she told no one that he had sexually harassed her. Under these circumstances, Shelby County cannot be liable under Title VII for failing to respond. *See, Shaw v. AutoZone, Inc.*, 180 F.3d at 812-813 ("Because Shaw never informed AutoZone of Noble's alleged harassment and because it had no reason to know of the harassment, there was nothing for AutoZone to respond to."); *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3rd Cir. 1999) (when employees' complaints do not refer to *sexually* offensive

behavior, employers are not on constructive notice of sexual harassment); *Jacob-Mua v. Veneman*, 289 F.3d 517, 523 (8th Cir. 2002) (Employee failed to establish that employer knew of alleged racial harassment when in her report to her supervisor, she did not indicate or imply that the altercation had anything to do with race); *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("The law requires an employer to be reasonable, not clairvoyant."); *Schiraldi v. AMPCO System Parking*, 9 F.Supp.2d 213, 218 (W.D.N.Y. 1998) (Plaintiff's statement, "Please keep Tyrone away from me; he's bothering me," did not give the employer notice of sexual harassment); and *Cooper-Schut v. Visteon Automotive Systems*, 361 F.3d 421, 426 (7th Cir. 2004) ("the employee must give the employer enough information to make a reasonable employer think there was some probability that she was being sexually harassed").

It is undisputed that when Rudd reported Burton's misconduct to Lt. Bonner the day after the incident, Lt. Bonner initiated an IAB investigation and had Rudd and Burton separated so that Rudd never again had any interactions with Burton after the day he handcuffed her to the filing cabinet. (TR ¶¶ 11-22; and TR 324)

Because under either standard, deliberate indifference or negligence, Shelby County's response was prompt and effective, the writ should be denied.

II. The evidence is sufficient to establish the *Faragher/Ellerth* affirmative defense.

Where no tangible employment action is involved, a defending employer may raise an affirmative defense, by showing:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765; and *Faragher*, 524 U.S. at 807.

Shelby County raised the *Faragher/Ellerth* affirmative defense in its Answer and has asserted it throughout the proceedings. Both the district court and the Sixth Circuit declined to consider the affirmative defense because Burton was Rudd's co-worker and not her supervisor. The Sixth Circuit quoted *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 n. 6, 124 S.Ct. 2342 (2004), as follows: "*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we." (Footnote 1 on page 3a of Petition)

Two sentences in *Suders* explain the breadth of the affirmative defense. First, the Court observed that:

> [H]arassment so intolerable as to cause a resignation may be effected through (1) co-worker conduct, (2) unofficial supervisory conduct, or (3) official company acts.

542 U.S. at 148, 124 S.Ct. at 2355. (Numbering added)

A few sentences later in the opinion, the Court held:

> [W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.

542 U.S. at 148, 124 S.Ct. at 2355.

Because the affirmative defense is obviously available to an employer in a case of constructive discharge caused by either co-worker (sexually harassing) conduct or unofficial supervisory (sexually harassing) conduct, the affirmative defense should also be available in a case where, as here, co-worker sexually harassing conduct does not result in a constructive discharge. There is no logical justification to hold otherwise.

If the Court grants the petition for a writ of certiorari, Shelby County will ask the Court to consider also the availability of the *Ellerth/Faragher* affirmative defense in cases of co-worker harassment because Rudd never availed herself of the protections of the written sexual harassment policy, and she suffered no tangible employment action.

III. This case does not involve "a wrong without a remedy."

Rudd has already received, and is receiving, significant relief from Shelby County for the psychological injuries she suffered as the result of being handcuffed to the filing cabinet. For the past several years, she has been receiving a tax free line-of-duty disability pension from Shelby County. The monthly benefit was $2,122.14 as of January 1, 2003. (¶ 9 of Seward's statement, Joint Appendix ("APX") 248)

She also has a workers compensation lawsuit pending against Shelby County based on the same incident. (APX 408)

In her Complaint initiating this action, she included a count alleging assault and battery against Lance Burton

in his individual capacity. The same day she filed suit in the U.S. District Court, she also filed an identical complaint in the circuit court of Tennessee containing the same claims against the same parties. Immediately before trial in the U.S. District Court, Rudd asked for and obtained an Order dismissing Burton without prejudice. (APX 363) Because her state court complaint against Burton is still pending in the circuit court of Tennessee, she still might obtain further redress without distorting Burton's offensive conduct into a civil rights violation. *See*, *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 522 (6th Cir. 2001).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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